

Peter J. Richardson (ISB No. 3195)
Greg Adams (ISB 7454)
Richardson Adams, PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for the Industrial Customers of Idaho Power

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF IDAHO POWER COMPANY FOR AN)	
ORDER APPROVING THE TRANSFER)	CASE NO. IPC-E-15-26
AND SALE OF CERTAIN ASSETS TO)	
THE UNITED STATES DEPARTMENT OF)	PETITION FOR RECONSIDERATION
JUSTICE FEDERAL BUREAU OF)	OF THE INDUSTRIAL CUSTOMERS
INVESTIGATION.)	OF IDAHO POWER
_____)	

The Industrial Customers of Idaho Power (“ICIP”), petitioner herein, pursuant to the Idaho Public Utilities Commission’s (“Commission”) Rules of Procedure (“IPUC RP”) 33 and 331, and Idaho Code Section 61-626, respectfully petitions the Commission for reconsideration of Order No. 33470 dated February 24, 2016, issued in Case No. IPC-E-15-26, (the “Order”).

I.

LEGAL STANDARD

IPUC RP 331.01 provides, “Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quality of evidence or argument the petition will offer if reconsideration is granted.”

See also I.C. § 61-626.

II.

GROUND FOR RECONSIDERATION

The Commission's Order is not in conformity with the law in that it: (1) obviates this Commission's obligations under the Idaho Public Utility Laws; (2) inappropriately applies Idaho Code Sections 61-327 and 61-328 to regulate a proposed sale, to a private entity not engaged in providing electric service to the public, of utility-owned assets on the customer side of the meter; and (3) it is arbitrary because it allows Idaho Power to engage in discriminatory treatment of its customers in the determination of the sales price for such utility-owned assets.

III.

THE COMMISSION HAS THE OBLIGATION AND AUTHORITY TO SET PRICES FOR THE SALE OF UTILITY ASSETS

The Commission has an ongoing obligation to insure that rates and charges Idaho Power extracts for its service and facilities are fair, just and reasonable. Idaho Code Sections 61-301 and 61-302 provide:

All charges made, demanded or received by any public utility . . . for any product or commodity furnished or to be furnished or any service rendered to or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

Idaho Power, by owning, providing and maintaining electrical facilities for its ratepayers'

convenience that are located beyond the meter, is without a doubt, providing service, instrumentalities, equipment and facilities to its patrons.

The requirements in Idaho Code Section 61-301 for the provision of “adequate, efficient, just and reasonable” service are augmented by Idaho Code Section 61-502 which provides, in part:

Whenever the commission . . . shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith . . . or that the rules, regulations, practices, or contracts of any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential . . . the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force and shall fix the same by order as hereinafter provided...

Emphasis provided.

The Commission has broad powers to regulate the provision of utility services, including the provision of utility-owned facilities on the ratepayer side of the meter, pursuant to Idaho Code Section 61-503, which provides:

The Commission shall have power . . . to investigate a single rate, fare, toll, rental, charge, classification rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules regulations, contracts or practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices...

Emphasis provided.

There is no question that the provision of facilities beyond the ratepayer’s meter by Idaho Power is part and parcel of the provision of utility service. The Commission has exercised its jurisdiction over the provision of such services through the promulgation of Rule M and Schedule 66. However, the Commission has only partially fulfilled its statutory obligation to regulate Idaho Power’s provision of such service through the promulgation of Rule M. That rule

sets detailed provisions for determining most of the contract terms and practices in the provision of such services. However, Rule M does not address the determination of the price or terms for the sale of such facilities that are used solely by the ratepayer taking such service.

While it may be argued that Idaho Power has no obligation to sell its facilities beyond the customer's point of delivery, when it chooses to do so, it is acting in its capacity as a regulated utility and is clearly engaging in "contracts or practices . . . affecting such rates, fares, tolls, rentals, charges or classifications" and such "contracts or practices" are clearly covered by the Idaho Public Utilities Laws including Idaho Code Sections 61-301, 501 and 503. If the provision of such services were not part and parcel of the regulated services Idaho Power is engaged in, then Rule M would be of no effect. In essence, when the Commission allows Idaho Power to unilaterally determine the price for the sale of utility-owned assets on the customer side of the meter, it is leaving the ratepayer to fend for him- or herself in exactly the unequal bargaining position that the Public Utilities Laws of the State of Idaho were designed to prevent. A customer who disagrees with the price unilaterally set by Idaho Power is left with no choice but to either terminate the service all together, which itself requires the payment of a fee to Idaho Power, or pay whatever price Idaho Power chooses to charge to sell the assets.

Under the terms of Rule M, a customer who chooses to terminate service only need pay Idaho Power for the "non-salvage cost" of the facilities. Rule M at ¶ 2. However, under Idaho Power's unilateral business practices, that same customer who wishes to purchase such facilities must pay Idaho Power its expected future profits and lost potential revenues on those facilities. Whether or not such charges for lost revenues and profits are "just, reasonable or sufficient" is never put to the Commission for determination. Indeed, the Commission has explicitly declined to make its statutorily obligated findings with regard to the sufficiency of the price. In this case,

the Commission declared:

As we have previously observed, the Commission lacks authority to force a particular sale between a utility and a customer. Order No. 32940 (“Idaho Code § 61-328 does not provide the Commission with the authority to compel a utility to sell property.”)

Consistent with our prior Orders, we are reluctant to prescribe precise rules dictating how parties should negotiate and agree to a purchase price. Id. Rather, we will evaluate applications for the sale of facilities on a case-by-case basis. See Order No. 32426 at 33.

Order No. 33470 at 6.

The crux of the ICIP’s Petition for Reconsideration is the Commission’s finding that “we are reluctant to prescribe precise rules dictating how parties should negotiate and agree to a purchase price.” Id. The ICIP does not address whether the Commission has the authority to force a particular sale, but only that when a utility proposes to engage in such a sale that the Commission has the obligation to set fair, just and reasonable rates, fares, tolls and contracts inherent in those sales.

The ‘catch-22’ facing ratepayers is apparent in the order relied on in the above cited passage. In Order No. 32940, the Commission addressed a similar question as to whether it should set the purchase price for utility-owned assets on the customer side of the meter. In declining to do so, the Commission declared:

Oftentimes the effect of a proposal cannot be accurately measured until after approval and implementation. Such is the case here. Rule M does little, if anything, to advance the interests of Idaho Power’s distribution facilities customers if Idaho Power can single-handedly shut down negotiations. However, Simplot is not left without a remedy. We encourage Idaho Power and Simplot to continue negotiations. We believe that there is enough flexibility in the valuation of the distribution facilities for both parties to move further toward an agreeable price. If negotiations fail, Simplot can choose to accept the sales price offered by Idaho Power or it may choose to purchase its own distribution facilities.

Order No. 32940 at 6. Emphasis provided.

The take-it-or-leave-it solution for determining the sales price for utility-owned facilities on the customer side of the meter is no solution at all. It leaves the customer with the non-choice

of accepting Idaho Power's price or termination (for a fee) of such service. This Commission has a statutory obligation to step up to the plate and establish parameters for determining the price for the sale of utility assets located on the customer's side of the meter when the utility chooses to make such sales. It has the clear authority, and indeed the obligation, to do so pursuant to the Idaho Public Utilities Law, to prevent discriminatory and preferential treatment and ensure just and reasonable charges.

IV.

IDAHO CODE SECTION 61-328 IS INAPPLICABLE TO THE SALE OF UTILITY ASSETS TO CUSTOMERS

The Commission assumes that Idaho Code Sections 61-328 is applicable to the sale of utility-owned assets to customers. However a careful reading of the statute suggests otherwise. Significantly, this section of the Idaho Public Utilities Law contemplates the sale of utility assets that will be used to serve the public and not a single, sole, individual entity. Paragraph 3(c) of that section requires that the Commission find:

That the applicant for such acquisition or transfer has the bona fide intent and the financial ability to operate and maintain said property in the public service.

It cannot be seriously contended that the sale of a utility asset that will be used for the sole benefit of a single customer to the exclusion of all other customers is being placed in the "public service." This incongruous result is buttressed by the additional finding the Commission must make pursuant to Paragraph 3(a) which requires a finding that the sale will also be in the "public interest." The requirement that the sale be both "in the public interest" and that the asset be placed in "public service" are not redundant. They are separate statutory requirements. It may be argued that the sale of an asset that is used for private purposes by a single customer somehow furthers the public interest, but it cannot at the same time, and with respect to the same sale, be

argued that such an asset has also been placed in the “public service.”

Idaho Code Section 61-327 provides additional support for the ICIP’s contention that Section 628 does not apply to the sale of assets to private customers of a utility. That section prohibits the sale of any utility asset that will be placed in the public service to any entity (including a governmental entity such as the FBI) unless that entity is either rate regulated by this Commission or is a cooperative or municipal utility organized under the laws of the State of Idaho:

No title to or interest in any public utility . . . property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferable to, or acquired by, directly or indirectly, by any means or device whatsoever, any government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation, organized or existing under the laws of any other state; or any person, firm, association, corporation or organization acting as trustee, nominee, agent or representative for, or in concert or arrangement with, any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation organized or existing under the laws of this state or any other state whose issued capital stock, or other evidence of ownership, membership or other interest therein, or in the property thereof, is owned or controlled, directly or indirectly by any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized under the laws of any other state, not coming under or within the definition of an electric public utility or the jurisdiction, regulation and control of the public utilities commission of the state of Idaho under the public utilities laws of this state; provided, nothing herein shall prohibit the transfer of any such property by a public utility to a cooperative electrical corporation organized under the laws of another state, which has among its members mutual nonprofit or cooperative electrical corporations organized under the laws of the state of Idaho and doing business in this state, if such public utility has obtained authorization from the public utilities commission of the state of Idaho pursuant to section 61-628, Idaho Code.

The import of this 1951 statute was explained by the Idaho Supreme Court in *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 589 (1983):

The PUC asserts that if Idaho Power has subordinated water rights used in the generation of electricity, it has violated I.C. §§ 61-327 and 61-328. I.C. § 61-327 provides generally that property in this state used in the generation or transmission of electricity shall not be

transferred in any manner to out-of-state organizations, governmental entities, or any entity not subject to regulation by the PUC. I.C. § 61-328 provides that any transfer of such property must be approved by the PUC after public hearings. I.C. § 61-329 states that property transferred in violation of those sections shall escheat to the state and the attorney general must institute court proceedings to adjudicate such an escheat, and I.C. § 61-329 sets forth criminal penalties for violation of the preceding sections.

Thus it appears that the statutory scheme relied upon by the Commission in this matter is not designed to, nor does it contemplate, the sale of utility assets to individual customers of the utility. The Commission has no authority under Idaho Code Section 61-328 to structure a sale of utility assets to an entity not subject to the Commission's regulatory authority. This section does not, however, contemplate sales of utility assets that are not placed in the public service, such as individual private customers.

V.

THE COMMISSION'S TREATMENT OF SALE OF UTILITY-OWNED ASSETS ON THE CUSTOMER SIDE OF THE METER IS DISCRIMINATORY AND ARBITRARY

The Commission has historically approved the sale of utility-owned assets on the customer's side of the meter at net book value of those assets. *See In the Matter of the Application of Idaho Power Company for Authority to Sell to PacifiCorp the Goshen Series Capacitor Bank* Order No. 31007 at 2, February 17, 2010:

Staff believes that the current proposed sale of the Goshen Series Capacitor Bank is consistent with the public interest for two primary reasons. First, the sale allows Idaho Power to receive revenues equal to the book value for an asset that is no longer used in Idaho Power's system.

See also, Sinclair Oil Company, dba, the Sun Valley Resort in Docket No. IPC-E-05-16, Order No. 29864, September 12, 2005. Allowing Idaho Power to unilaterally determine the sales price, and charge for lost revenues and profits, is not only a departure from historic Commission precedent, it is an arbitrary abdication of the Commission's duties to affirmatively set the rates

and terms of service for utilities it regulates. The Commission has not explained why it has suddenly departed from its traditional book value approach to the sale of utility assets by now allowing Idaho Power to unilaterally set a sales price that far exceeds book value. Arbitrary changes of Commission policy with no explanation or rationale are contrary to the Commission's obligations to set fair, just, reasonable and non-discriminatory rates. The Commission should open an investigation to set uniform and non-discriminatory rules for setting the sales price of utility-owned assets located on the customer side of the meter.

VI.

METHOD OF RECONSIDERATION

RP 331(3) requires that petitions for reconsideration state the method by which reconsideration is requested. The ICIP requests reconsideration by submission of legal briefs and does not believe further evidentiary hearings are necessary.

VII.

PRAYER FOR RELIEF

WHEREFORE, the Industrial Customers of Idaho Power respectfully request the Commission issue its order granting reconsideration of its decision not to initiate a proceeding to establish parameters for determining the price for the sale of Idaho Power-owned assets subject to Rule M such that customers and Idaho Power will know, in advance, of the possible dollar impact of their embarking on negotiations for the sale/purchase of such assets.

RESPECTFULLY SUBMITTED this 16th day of March 2016
Richardson Adams, PLLC



Peter J. Richardson
Industrial Customers of Idaho Power

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of March, 2016, a true and correct copy of the within and foregoing PETITION TO RECONSIDERATION BY THE INDUSTRIAL CUSTOMERS OF IDAHO POWER in Docket No. IPC-E-15-26 was served electronically and by HAND DELIVERY, to:

Lisa Nordstrom
Shelli D. Stewart
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83707-0070
lnordstrom@idahopower.com
sstewart@idahopower.com

Jean Jewell
Idaho Public Utilities Commission
472 West Washington St.
Boise, Idaho 83702
jean.jewell@puc.idaho.gov

Tami White
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83707-0070
twhite@idahopower.com

Daphne Huang
Idaho Public Utilities Commission
472 West Washington St
Boise, Idaho 83702
daphne.huang@puc.idaho.gov



Nina Curtis
Administrative Assistant